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Status: **legally binding**

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## Class Ruling

# Nufarm Limited – non-executive directors share rights plan

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### **❶ Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences for employees of Nufarm Limited (Nufarm) who participate in the Nufarm Limited Non-Executive Directors Share Rights Plan (the Plan).
2. Full details of this scheme are set out in paragraphs 15 to 43 of this Ruling. By issuing this Ruling, the ATO is not endorsing the Plan. Potential participants must form their own view about the Plan.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you are a non-executive director (NED) of Nufarm who:
  - participates in the Plan, and
  - is a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 15 to 43 of this Ruling. Division 230 will not apply to individuals, unless they have made an election for it to apply.

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**When this Ruling applies**

6. This Ruling applies from 1 October 2021 to 30 September 2026.

**Ruling**

7. The Plan is an employee share scheme (ESS) as defined in subsection 83A-10(2).

8. The right to be granted a Nufarm share under the Plan for each participation agreement (the Right) is an ESS interest as defined in paragraph 83A-10(1)(b).

9. Subdivision 83A-C will apply to the Right granted to you.

10. If you cease to be a NED and you receive a cash payment before a Right is granted, Division 83A will not apply and the cash payment will be included in your assessable income in the same income year in which you received that payment (section 6-5).

11. For the purposes of Division 83A, the time the Right is acquired for a plan year that runs from 1 October to 30 September (Plan Year) is 1 October, being the start of the Plan Year (section 83A-340).

12. Where the Right converts into a Nufarm share, the ESS deferred taxing point (as determined in section 83A-120) will (subject to the 30-day period in subsection 83A-120(3)) be the earliest of the:

- time when you cease employment (subsection 83A-120(5))
- end of the 15-year period starting when the Right was acquired for the purposes of Division 83A (subsection 83A-120(6)), or
- end of the period during which you are prohibited from dealing with your Nufarm share (subsection 83A-120(7)).

13. Your assessable income for the income year in which the ESS deferred taxing point occurs (as determined in section 83A-120) includes the market value of the Nufarm share at that time (subsection 83A-110(1)).

14. If you dispose of your Nufarm share on or before the ESS deferred taxing point (including where the ESS deferred taxing point is extended under the 30-day rule in subsection 83A-120(3)), any capital gain or capital loss is disregarded (subsection 130-80(1)).

**Scheme**

15. The following description of the scheme is based on information provided by Nufarm. If the scheme is not carried out as described, this Ruling cannot be relied upon.

16. Nufarm is a public company and its shares are listed and quoted on the Australian Securities Exchange.

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**The Nufarm Limited Non-Executive Directors Share Rights Plan**

17. The Plan is a long-term incentive scheme to encourage NEDs to acquire Nufarm shares in order to improve the alignment between a NED's interests and those of Nufarm's shareholders.
18. Each Plan Year runs from 1 October to 30 September and the first Plan Year is from 1 October 2021 to 30 September 2022.
19. The Plan is operated in accordance with the terms set out in the Plan, together with the terms set out in the agreement that Nufarm sends to you each year.
20. Once the agreement is executed by you (Participation Agreement), it must be returned to Nufarm. The terms of the Participation Agreement will be binding from 1 October, which is the commencement date of the relevant Plan Year.
21. To participate in the Plan, you must agree to sacrifice a percentage of your NED fee (between 20% and 100%) for the Plan Year.
22. You must also nominate a disposal restriction period when entering into the Participation Agreement that is between three and 15 years after the commencement of the financial year in which the Rights are granted (Restriction Period). The Restriction Period cannot be amended after the agreement is executed.
23. Provided you continue to be a NED of Nufarm, Nufarm will grant to you the number of Rights at the times provided for in the Participation Agreement.
24. The Rights to which you are entitled in respect of the relevant year will be granted to you on the fifth business day following the date on which Nufarm publicly releases its Annual Financial Report for the income year ending 30 September (on or around 24 November).
25. The number of Rights granted will be equal to the amount of NED fees you agreed to sacrifice for the Plan Year, divided by the five-day volume-weighted average price of Nufarm Shares over the period immediately prior to the date of grant.
26. The Rights are not transferrable. The Rights will be held on Trust by the Nufarm Employee Share Trust on your behalf.
27. The Plan rules specify that Subdivision 83A-C applies to the Rights.

**Vesting of Rights under the Nufarm Limited Non-Executive Directors Share Rights Plan**

28. For each Plan Year, Rights will vest in two tranches with a different vesting date for each tranche.
29. Tranche 1 Rights will vest on the second business day immediately following the date on which Nufarm publicly releases its half-yearly financial report for the Plan Year (likely on or around 19 May).
30. Tranche 2 Rights will vest on the second business day immediately following the date on which Nufarm publicly releases its Annual Financial Report for the Plan Year (likely on or around 18 November).
31. No Nufarm Shares will be allocated on the vesting dates.
32. Upon vesting, Tranche 1 Rights will be exercised automatically and Nufarm Shares will be allocated to you on the third business day after the date on which Nufarm releases its half-yearly financial report for the Plan Year.

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33. Upon vesting, Tranche 2 Rights will be exercised automatically and Nufarm Shares will be allocated to you on the third business day after the date on which Nufarm publicly releases its annual financial report for the Plan Year.

### **Disposal restrictions**

34. The transfer or disposal of Nufarm shares received under the Plan is subject to restrictions under the Plan rules and Nufarm's Security Trading Policy.

35. Under the Plan rules, you are prohibited from dealing in your Nufarm shares until the earlier of:

- the date you cease to be a NED of Nufarm
- the Restriction Period you nominated in the application form, and
- a determination by the Nufarm Board that the Restriction Period ends (on a change of control event or in exceptional circumstances).

36. The Nufarm shares allocated to you under the Plan will have a holding lock applied within the meaning of the Australian Securities Exchange listing rules whereby you will be unable to dispose of the Nufarm shares for the period restricted under the Plan rules.

37. Under the Nufarm Securities Trading Policy, you are:

- required to obtain prior approval to trade in Nufarm shares at all times, and
- prohibited from dealing in Nufarm shares if you possess any inside information.

38. Additionally, under the Nufarm Securities Trading Policy, you may be given prior written clearance to acquire or dispose of Nufarm shares in exceptional circumstances where you:

- are in severe financial hardship or other exceptional circumstances apply
- are not actually in possession of inside information in relation to Nufarm shares, and
- have consulted the Nufarm Chairman who has given prior written approval.

39. In accordance with the Nufarm Limited Securities Dealing Policy, any breaches of the policy are considered serious and may result in disciplinary action against the Participant.

### **Ceasing to be a non-executive director**

40. If you cease to be a NED of Nufarm before you exercise your allocated Rights:

- any vested Rights will not lapse
- a pro rata number of unvested Rights (based on the number of weeks in the financial year that have elapsed at the time you cease to be a NED) will vest with the remaining unvested Rights lapsing without any corresponding payment being made to you in respect of those unvested Rights, and
- the pro rata number of vested Rights will then be automatically exercised and Nufarm shares will be delivered to you.

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41. If you cease to be a NED of Nufarm in the period after 1 October of a Plan Year and before the Rights are granted, you will be paid a cash amount that you would have received if you had not entered into the Participation Agreement (less any applicable taxes and superannuation contributions).

#### **Other matters**

42. Immediately after the acquisition of any Rights under the Plan, you will not hold a beneficial interest in, or a right to acquire a beneficial interest in, more than 10% of the shares in Nufarm or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of Nufarm.

43. The predominant business of Nufarm is not the acquisition, sale or holding of shares, securities or other investments, whether directly or indirectly through one or more companies, partnerships or trusts.

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**Commissioner of Taxation**

8 December 2021

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Status: **not legally binding**


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## Appendix – Explanation

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**❶** *This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

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### **ESS interests and indeterminate rights**

44. An ESS interest in a company is a beneficial interest in a share in the company or a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

45. Under the Plan, rights acquired on 1 October in the relevant Plan Year are only beneficial interests in rights that will later become rights to acquire beneficial interests in Nufarm shares. This is because the number of rights cannot be ascertained until the calculation occurs at a later point in time, as outlined in paragraphs 21 to 25 of this Ruling. Once the number of rights is ascertained they become rights to acquire Nufarm shares.

46. Subsection 83A-340(1) applies where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share which is referred to as an indeterminate right. A person will acquire an indeterminate right when they can enforce against their employer (under the terms of contract) rights that will later become a beneficial interest in a share (refer to Taxation Determination TD 2016/17 *Income tax: in what circumstances does a contractual right, which is subject to the satisfaction of a condition, become a right to acquire a beneficial interest in a share for the purposes of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*).

47. Therefore, where the Rights granted to you ultimately vest and are settled with Nufarm shares after the vesting date, section 83A-340 will apply to those Rights. The Rights will be treated as if they had always been rights to acquire a beneficial interest in the share. That is, they will be treated as an ESS interest (subsection 83A-10(1)) from when you acquired the Rights which is when the Plan becomes binding between you and Nufarm for the relevant Participation Agreement and you commence sacrificing your agreed proportion of base fee in accordance with the Plan, thereby obtaining a right to Rights.

48. The Plan is an ESS as defined in subsection 83A-10(2) as it is a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment (subsection 83A-10(2)).

49. The Plan provides that the Right is issued for no consideration. This means the Right was issued at a discount pursuant to subsection 83A-20(1). Subdivision 83A-B will apply to the Right acquired by you under the Plan unless Subdivision 83A-C applies.

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### **Assessability of a right under Subdivision 83A-C**

50. Subdivision 83A-C allows the discount in relation to the ESS interest to be included in assessable income at a later time if the following relevant conditions (in subsection 83A-105(1)) are satisfied:

- Subdivision 83A-B would, apart from section 83A-105, apply to the interest (paragraph 83A-105(1)(a))
- paragraph 83A-105(1)(aa) results in a participant continuing to receive a discount in relation to the interest
- subsections 83A-45(1) to (3) and (6) apply to the interest (paragraph 83A-105(1)(b)), and
- pursuant to subsection 83A-105(6), at the time you acquired the interest the scheme genuinely restricted you immediately disposing of the Right and the governing rules of the scheme expressly state that Subdivision 83A-C applies to the scheme (paragraph 83A-105(1)(d)).

51. In relation to the first condition listed in paragraph 50 of this Ruling, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the Right because it is:

- a beneficial interest in a right to acquire beneficial interest in a share of Nufarm, and
- provided to you as an employee of Nufarm in relation to your employment and will be provided for nil consideration (that is, at a discount).

52. In relation to the second condition listed in paragraph 50 of this Ruling, paragraph 83A-105(1)(aa) requires that after applying section 83A-315 (which refers to the regulations for calculating the market value of an ESS interest where it is an unlisted right), there is still a discount given in relation to the interest.

53. Section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021* states:

If the lowest amount that must be paid to exercise the right to acquire the beneficial interest in a share is nil or cannot be determined, the value of the right on a particular day is the same as the market value of the share on that day.

54. As the Right is provided for nil consideration, that is a discount to the market value of a share in Nufarm. As such, you will receive a discount in relation to the Right.

55. In relation to the third condition listed at paragraph 50 of this Ruling, subsections 83A-45(1) to (3) and (6) apply to the Right granted because:

- when the Right is acquired, you were employed (or in a relationship similar to employment) by Nufarm (subsection 83A-45(1) and section 83A-325)
- all of the ESS interests available for acquisition under the Plan relate to the ordinary shares of Nufarm (subsection 83A-45(2))
- the predominant business of Nufarm is not the acquisition, sale or holding of shares, securities or other investments (subsection 83A-45(3)), and
- immediately after the acquisition of the Right, you will not hold a beneficial interest in more than 10% of the shares in Nufarm nor be in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of Nufarm (subsection 83A-45(6)).

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56. In relation to the fourth condition listed in paragraph 50 of this Ruling, Subdivision 83A-C applies because:

- the interest is a beneficial interest in a right (paragraph 83A-105(6)(a))
- the Plan genuinely restricts you from immediately disposing of the Right (subparagraph 83A-105(6)(b)(i)), and
- the governing rules of the Plan expressly state that the Plan is intended to operate in accordance with Subdivision 83A-C (subparagraph 83A-105(6)(b)(ii)).

57. As a result, Subdivision 83A-C applies to the Right and Subdivision 83A-B does not apply. The taxation of the Right received under the Plan will be deferred until an ESS deferred taxing point occurs.

### ***ESS deferred taxing point***

58. Section 83A-120 provides the rules for determining when the ESS deferred taxing point occurs for a right to acquire a share. This will be the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right and the scheme no longer genuinely restricts immediate disposal of the right (subsection 83A-120(4))
- when you cease employment (within the meaning of section 83A-330) in respect of which you acquired the right (subsection 83A-120(5))
- 15 years after you acquired the right (subsection 83A-120(6)), and
- after the right is exercised, when there is no real risk of forfeiting or losing the share and the scheme no longer genuinely restricts disposal of the share (subsection 83A-120(7)).

59. However, if you dispose of the vested right or the share within 30 days of the earliest time outlined in paragraph 58 of this Ruling, the ESS deferred taxing point will instead be the time of disposal (paragraph 83A-120(3)(b)).

60. For the purposes of Division 83A, the concept of 'exercising a right' is not considered to necessarily require an action or activity by the beneficial owner of the right. It is enough that they become the beneficial owner of the share that is the subject of the Right (this can happen automatically or at the instigation of the participant, the employer or another party). Therefore, you are taken to have exercised the Right when a Nufarm share is allocated upon vesting of the Right.

61. As determined in section 83A-120, where your Right vests, the ESS deferred taxing point will (subject to the 30-day rule) be the earliest of:

- the time when you cease employment (subsection 83A-120(5))
- 15 years from when you acquired the Right (subsection 83A-120(6)), and
- the end of the period during which you are prohibited from dealing with your Nufarm share (subsection 83A-120(7)).

62. However, if you dispose of your Nufarm share acquired from vesting of the Right within 30 days of the earliest time outlined in paragraph 61 of this Ruling, the ESS deferred taxing point will be the date of disposal (subsection 83A-120(3)).



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***Amount to be included in assessable income***

63. In accordance with section 83A-110, the amount to be included as assessable income in the income year in which the ESS deferred taxing point occurs is the market value of the ESS interest at the ESS deferred taxing point, reduced by the cost base of that interest (if any).

64. Where the ESS interest is a right to acquire a beneficial interest in a share, the market value of the right at the ESS deferred taxing point is the market value of the share at that time (section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

65. Therefore, the amount included in your assessable income at the ESS deferred taxing point is the market value of the Nufarm share acquired upon vesting of a Right at the ESS deferred taxing point less the cost base of the Right. As the Right is granted for nil consideration and no amount is paid to exercise the Right, the first element of the cost base of the Right is nil (subsections 83A-110(1) and 110-25(2)).

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Status: **not legally binding**

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10, TD 2016/17

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(b)
- ITAA 1997 83A-10(2)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-45(1)
- ITAA 1997 83A-45(2)
- ITAA 1997 83A-45(3)
- ITAA 1997 83A-45(6)
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- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(1)(a)
- ITAA 1997 83A-105(1)(aa)
- ITAA 1997 83A-105(1)(b)
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- ITAA 1997 83A-105(6)(b)(ii)
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- ITAA 1997 83A-315
- ITAA 1997 83A-325
- ITAA 1997 83A-330
- ITAA 1997 83A-340
- ITAA 1997 83A-340(1)
- ITAA 1997 110-25(2)
- ITAA 1997 130-80(1)
- ITAA 1997 Div 230
- TAA 1953
- Income Tax Assessment (1997 Act) Regulations 2021 83A-315.03

*Other references:*

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009

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ATO references

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